No. 14498

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a Corporation,

Appellant,

vs.

LaVERL JOHNSON and JOLEEN JOHNSON,
Husband and Wife, and PACIFIC FRUIT EXPRESS
COMPANY, a Corporation,

Appellees.

Brief of Appellant

UNION PACIFIC RAILROAD COMPANY

Appeal from the United States District Court for the
District of Idaho, Eastern Division

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GATEWAY PRINTERS – POCATELLO

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TEXTS

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UNION PACIFIC RAILROAD COMPANY

STATEMENT OF THE CASE

On the 20th day of March, 1953, appellees LaVerl and Joleen Johnson instituted this action against the appellant Union Pacific Railroad Company for damages arising out of personal injuries sustained by LaVerl Johnson on November 4, 1950, while employed by the Pacific Fruit Express Company at Pocatello, Idaho. Said appellees claimed the appellant was negligent in the furnishing of electrical energy and in the operation of an electrical substation in the City of Pocatello. Johnson's injuries resulted in the loss of both legs below the knees and the loss of his right arm near the shoulder, for which appellees prayed damages in the amount of $300,000.00 (R 4, 7).

Appellant answered denying that it was negligent or that appellees had been damaged in the sum of $300,000.00, or in any sum whatsoever, and admitting the injury sustained by LaVerl Johnson as set forth in paragraph IV of its Answer. Appellant set up as separate defenses the statute of limitations, contributory negligence, and assumption of risk (R 9-12).

The defense of the statute of limitations was withdrawn after the trial commenced (R 110-113), and the court struck all testimony previous to that except the hospital record and testimony relating to disability, pain, suffering, humiliation, and things of that kind (R 16, 112). The case came on for trial before the Honorable Chase A. Clark, District Judge, and a jury, on the 18th day of November, 1953. At the close of all of the evidence appellant moved the court to instruct the jury to return a verdict in its favor (R 18, 363-365), which was by the court denied (R 365), following which the case was submitted to the jury the afternoon of November 25th, who returned a verdict in favor of the appellees in the sum of $225,000.00 (R 18-19) upon which judgment was entered (R 19-20).

Thereafter appellant served and filed its Motion for Judgment Notwithstanding the Verdict and for New Trial (R 20-28), both of which were by the court on August 16, 1954, denied (R 31-35). On the same date the judgment was amended to allow the Pacific Fruit Express Company, as intervenor, to recover out of the proceeds of the Judgment the amount it has or will be required to pay appellees under the Idaho Workmen's Compensation Act (R 29-31). From

the judgments entered the Railroad Company has appealed (R 35).

JURISDICTION

Jurisdiction of the District Court is based upon diversity of citizenship of the parties and that the amount involved, exclusive of interest and costs, exceeds $3,000.00. Appellees are citizens of Idaho and the appellant is a citizen of Utah (R. 3). Accordingly the District Court had jurisdiction, 28 USCA 1332, and this court has jurisdiction to review the case on appeal, 28 USCA 1291, Rule 73 Federal Rules of Civil Procedure.

QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED

1. Whether appellees established by substantial evidence that appellant was—(a) negligent in the furnishing of electrical energy; and (b) in the operation of an electrical substation (R 3-4), and if so, whether any such negligence was the proximate cause of Johnson's injuries. These and incidental questions are raised by the Answer (R 9-12), appellant's Motion for Directed Verdict (R 363-365), appellant's Requested Instruction No. 1 (R 37-38), Motion for Judgment Notwithstanding the Verdict and for a New Trial (R 20-28), and denial thereof by the trial court (R 31-35).

2. Admission of testimony of Elmer V. Smith over appellant's objection (R 22-23, 192-194).

3. Error of the court in the giving and refusing of instructions objected to at the trial (R 23-28, 382-387).

4. That the verdict is grossly and monstrously excessive, raised by appellant's Motion for Judgment Notwithstanding the Verdict and for a New Trial (R 20-28), and denied by the court (R 31-35).

5. That the verdict is against the law and the evidence is wholly insufficient to support the verdict and judgment, raised by appellant's Motion for Directed Verdict (R 363-365), Requested Instruction No. 1 (R 37-38), Motion for Judgment Notwithstanding the Verdict and for a New Trial (R 20-28), all denied by the trial court (R 31-35).

6. That the trial court should have sustained appellant's Motion for Judgment Notwithstanding the Verdict or should have granted appellant a new trial (R 20-28) instead of denying both of them (R 31-35).

STATEMENT OF THE FACTS

Prior to March 1, 1924, the Pacific Fruit Express Company was receiving power direct from the Idaho Power Company. On March 1, 1924, the Oregon Short Line Railroad Company (not a party to this action) entered into a contract with the Pacific Fruit Express Company, Exhibit No. 26, which recites that the Idaho Power Company had agreed to furnish power to the Oregon Short Line Railroad Company at a different rate than that provided for the Pacific Fruit Express Company, and under such arrangements the Pacific Fruit Express could obtain power through the Railroad

(R 314-315). The contract then provided for the building of a substation by the Oregon Short Line Railroad Company to be paid for by the Pacific Fruit Express (R 315), and the Pacific Fruit Express agreed to pay the Oregon Short Line Railroad Company for power delivered, plus 10% for transmission line and transformer losses (R 316). In other words, this was merely permitting the Pacific Fruit Express Company to take its energy off the Oregon Short Line Railroad Batiste line and cannot be construed to mean that the Oregon Short Line Railroad Company was delivering energy to the Pacific Fruit Express Company. It was not generating power and the effect of the agreement and the evidence was as stated, that it was permitted to hook a transmission line onto the Railroad Batiste line (R 161, 354).

This line and the sub-station, pursuant to the contract, Exhibit 26, was built by the Oregon Short Line Railroad Company, the cost of which was first estimated by the Pacific Fruit Express Company, Exhibit 30 (R 250), and about June 11, 1926, the actual cost was determined Exhibit 31 (R 251), and the Oregon Short Line Railroad Company was paid for the construction of the transmission line and substation by the Pacific Fruit Express Company (R 252), following which the Pacific Fruit Express Company made out a completion report, Exhibit 32 (R 252). All of these Exhibits, 30, 31 and 32, definitely state that ownership of the transmission line and the sub-station was in the Pacific Fruit Express Company.

The line and the sub-station are carried in the capital or investment accounts of the Pacific Fruit Express Company,

which shows ownership in that Company (R 266), and likewise the transmission line and sub-station are not carried in the capital or investment accounts of the Oregon Short Line Railroad Company or the Union Pacific Railroad Company. This is so because the Pacific Fruit Express Company paid for them and it is the owner (R 273-274).

Mr. Hubert Branum of the Pacific Fruit Express Company accepted the sub-station and the transmission line after completion for the Pacific Fruit Express Company (R 277). Ownership of the transmission line and sub-station was by the lessor, Oregon Short Line Railroad Company, acknowledged Ex. 28 (R 332). The Pacific Fruit Express Company is also the operator of the substation, Exhibit 32 (R 264, 294, 296).

Exhibit No. 27 is a lease from the Oregon Short Line Railroad Company to the Pacific Fruit Express Company dated April 29, 1926, and provides for a transformer and transmission line site. The transformer site and the transmission line are shown in yellow on Exhibit B attached to Exhibit No. 27, and is also shown on Ex. B attached to Exhibit No. 28. Exhibit No. 29 merely enlarges the transformer site from 15x22 to 33x31 feet, and continued the rental for the right to maintain and operate the transmission line across the tracks of the railroad to the sub-station (R 336-338).

Exhibit No. 35 shows the general location of various buildings about the Ice Plant, including the sub-station (R 278), and Exhibit 36 is a diagram of the sub-station, showing in general the transformer and the rest of the equip-

ment in the sub-station (R 279-280). Exhibit 35 also shows the line from the sub-station to the Ice Plant and the line running to the top of this Exhibit from the sub-station is the 12,500 volt line from the Batiste power line over to the sub-station where Johnson was injured. This line across the tracks from the Batiste line to the sub-station only serves the sub-station and does not serve any railroad facilities (R 166, 282, 341, 345). There are disconnect switches on the pole of the Batiste line where the line to the Pacific Fruit Express Company sub-station takes off (R 283), and at the top of the sub-station there is a pole top switch which deenergizes the three transformers in the sub-station (R 162, 163, 174, 302). In addition thereto there are disconnect switches at the sub-station to the lightning arrestors (R 163, 182, 203, 208-209, 239, 286, 345).

The sub-station in question is enclosed with a high wire fence (R 123, 166), and sets out in the open, so anyone, whether employee or otherwise, can come around it, but they cannot get into it. The area of the sub-station is about 30 square feet (R 123-124, 284).

The sub-station is kept locked (R 167, 169, 284). There is only one gate in the transformer cage, and that is in the west side. There are three transformers just inside the gate. The lightning arrestors are to the east of the transformers about 15 feet (R 141, 167-168).

This sub-station was standard when built and was what is termed a package substation, either of Westinghouse or General Electric (R 236, 346). It was the latest thing in sub-

stations at the time it was built (R 236). This station on November 4, 1950, and the equipment in it, was capable of receiving safely the electrical energy being delivered to it and to operate as a sub-station should. It was as safe as the day it was built. There was nothing defective about it or any of the equipment in it, but on the day in question it was not operated safely (R 182-183, 203-205, 236-237, 344-345). Accordingly there was no reason to cut off service to it, and the witness Gilbert stated he would not have advised his employer, the Idaho Power Company, to refuse to furnish energy to it (R 238). The standards now are the same and if the station had been operated properly, the disconnect switches pulled, it would have been perfectly safe (R 239-241). It has always operated satisfactorily as a sub-station and there were no injuries prior to November 4, 1950 (R 283).

LaVerl Johnson worked at the Pacific Fruit Express Company as a repairman (R 107), and his immediate superiors were Shoup and H. O. Johnson. Shoup was Plant Manager and H. O. Johnson was Assistant Plant Manager, both of whom worked for the Pacific Fruit Express Company and not for the Railroad; all were paid by the Pacific Fruit Express Company (R 224). H. O. Johnson died prior to the trial (R 123, 140).

LaVerl Johnson went to work at the Pacific Fruit Express Ice Plant about eight o'clock A. M., the morning of November 4, 1950. He was instructed by H. O. Johnson to paint electrical cables that go into the transformer which was in the small cage in the Ice Plant, and after that, or at about noon, H. O. Johnson gave him the keys to the large trans-

former cage and instructed him to go into this cage and paint in there as he had painted the other one (R 108, 110). There were only two keys to the sub-station gate and Mr. Shoup or his Assistant had possession of both keys; the Railroad had none (R 169, 293); McClellan saw LaVerl painting taped up wires in and out of the transformers that morning in the small cage (R 140-141). LaVerl testified that when H. O. Johnson gave him the key to the large transformer there was no one else around (R 231).

After lunch, and after mixing paint, LaVerl testified that he proceeded to the large transformer cage, unlocked the gate, walked around to work from the back side to the front and took hold of a wire that had not been deenergized (R. 110). He was severely burned and as a result thereof both legs were amputated six inches below the knees and his right arm three inches below the head of the humerus. His foot prints showed that after entering the gate he turned to the left, went around the north transformer, then switched back to the east to the lightning arrestors and then south to the south arrestor (R 141-142, 167-168). He testified that the transformers were right in front of the gate and was told to paint in this transformer cage like he had painted in the small one (R 228), and while he says he did not know the difference between a transformer and an arrestor he admits the arrestor did not look the same as the transformer he was working on in the morning, but insisted several times that on the morning before the accident occurred in the afternoon he saw several men who took lids off the transformer in the large sub-station, where he was later injured, and these men

were looking down inside the transformer (215, 230). He also stated that the arrestors did not look like transformers (R. 142).

LaVerl testified that he took no orders from the Railroad and the Railroad did not tell him to paint the cables; that he took all orders from someone of the Pacific Fruit Express Company and that he went into the sub-station alone (R 231-232).

At about 9 A. M. on November 4, 1950, Mr. James E. Johnson, Howard O. Johnson, and Melvin Judge, all Pacific Fruit Express men, (Judge was the PFE electrician) went into the sub-station for the purpose of checking the oil in the transformers, and contrary to some inferences raised by appellees' witnesses, there were no Railroad electricians there and no one from the Railroad at all (R 303-304, 308-309); there were some Pacific Fruit Express laborers that went in with them to cut weeds at the same time (R 303, 309), but the Johnsons and Judge were the last ones out and the gate was locked (R 304, 309). The laborers were warned that the arrestors were not deenergized and none of them got hurt (R 310, 313). Judge knew the arrestors were not deenergized and so did James E. Johnson and Howard Johnson (R 310). While in the sub-station that morning James E. Johnson pulled the pole-top switch which disconnected the power to the transformers, but did not pull the disconnect switches to the arrestors. LaVerl Johnson, instead of painting cables leading into and out of the transformers, went back behind the transformers to the arrestors where he received his injuries.

There is no dispute about the fact that there were disconnect switches to the arrestors that could have been pulled by someone at the Pacific Fruit Express, and there was a hot stick available to do this (R 286), and if these disconnect switches had been pulled, of course, Johnson would not have been injured (R 170, 182-183, 203, 239, 286), and if this had been done the substation would have been perfectly safe (R 182, 237, 238). It was the method of operation of the sub-station by the Pacific Fruit Express that made the sub-station unsafe for LaVerl Johnson, and if the disconnect switches had been pulled there would have been no danger in the sub-station (R 183, 203, 209, 237, 239, 246).

The Pacific Fruit Express Company operates entirely independent of the Union Pacific; they are separate corporations (R 235). The Pacific Fruit Express Company is a car line operator, and furnishes cars, refrigerator and heater service to various railroads, including the Union Pacific Railroad Company (R 359-361). The Pacific Fruit Express officers at Pocatello report to the Pacific Fruit Express officers in San Francisco, none of whom work for the Railroad, and no reports are made by the Pacific Fruit Express officers or employees to the Railroad (R 294-295, 360-361). The Pacific Fruit Express operates the sub-station (R 294), and no one from the Railroad has ever operated it, and no one from the Railroad has ever pulled the disconnect switches. Shoup and his Assistant has authority to pull them (R 295). Shoup did testify that at the time of the accident he thought the pole-top switch deenergized all power in the sub-station, but he had been Plant Manager at the Plant only since Septem-

ber 1, 1949 (R 292). However, Mr. Branum, Superintendent, had been here from the time the sub-station was first constructed; he knew about the switches (R 286); so did James E. Johnson, who pulled the pole-top switch the morning of the accident but did not pull the disconnect switches to the arrestors (R 304), and neither did Judge, who was the Pacific Fruit Express electrician (R 308, 310). Both of them knew what work was to be done (R 303, 308). Even they did not anticipate that later LaVerl Johnson was to be sent into this cage alone, or that he would endeavor to paint a bare wire on the lightning arrestor after having been instructed to paint taped up leads to or from the transformers. There were no Union Pacific electricians at the substation since Shoup has been Plant Manager there (September 1949) (R 292-293); but when they are called Mr. Shoup instructs them what to do. Union Pacific electricians have never changed any transformer oil—the Pacific Fruit Express does it (R 293-294, 346).

Union Pacific electricians all work for the Union Pacific, not for the Pacific Fruit Express (R 341, 346). The only time they do work for the Pacific Fruit Express is when someone from the Pacific Fruit Express calls them. They did some work in 1948 and 1949, and did the work shown on Exhibit 33 (R 257-259), for which the Pacific Fruit Express paid the Railroad. The Union Pacific electricians have no keys to the sub-station, and as a matter of fact did not work on Saturday, November 4, 1950 (R 343). The Union Pacific electricians have no duties to perform in the sub-station (R 350), and no one from the Pacific Fruit Express, or other-

wise, called the Railroad electricians on Saturday, and the lead electrician did not know of the accident until sometime the next day (R 343-344).

The Idaho Power Company has also done work for the Pacific Fruit Express, as has the Strand Electric Company. The Pacific Fruit Express is not required to call the Union Pacific electricians (R 358-359), and the Pacific Fruit Express does lots of their own work (R 358). As a matter of fact, the meter inside the sub-station was originally hooked up by the Idaho Power Company (R 284). The meter reader has to have someone at the Pacific Fruit Express let him in to read the meter, either Shoup or Johnson (R 114-115), and he has no key to the sub-station (R 115); Shoup has them (R 169, 293).

SPECIFICATION OF ERRORS

I.

The court erred in refusing to direct a verdict in favor of the Union Pacific Railroad Company, for the reasons stated in its Motion for Directed Verdict (R 363-365).

II.

The court erred in refusing to grant the Motion of the Union Pacific Railroad Company for Judgment Notwithstanding the Verdict, for reasons set forth therein (R 20-28), and for reasons set forth in its Motion for Directed Verdict, (R 363-365).

III.

The court erred in permitting appellees witness Elmer V. Smith to testify, over appellant's objection, to the duty of one furnishing electricity. The question, objection and ruling are as follows:

> "Mr. Smith, basing your answer now upon the condition that you have been describing there, from the exhibit and based upon your knowledge as an electrician and upon your knowledge of the National Safety Code, have you an opinion as to what the duty of one furnishing electricity under those circumstances, -yes, I will leave it that way, as to what would be the duty of one furnishing electricity under those conditions, - have you an opinion?
>
> "The Court: You may answer that question yes or no.
>
> "A. Yes.
>
> "Q. And what is your opinion as an expert?
>
> "Mr. Casterlin: If the Court please, we object to this question on the ground that it is invading the province of the jury and the province of the Court. The allegation in the complaint is that the defendant violated the rights of the plaintiff and this witness is asked in substance and effect, if the defendant has violated that duty. He is not being asked the question which I think counsel intended to ask him. He has asked the question whether or not he has, that is, the defendant has violated that duty, which necessarily involves the inference that it owes a duty in that respect and has violated it and that invades the province of the Court and the jury and attempts to pass

or passes upon the merits of the allegations of the complaint.

"The Court: I take it the only way the jury or the Court or anyone else could get any information on this matter is from the opinion of experts. There would have to be some foundation for the jury to pass upon the question that would be submitted to them. The only way I know of that they could get that information would be from physical conditions and from opinions of experts. This man is qualified as an expert. There is only one part of the question that possibly should be eliminated and that is the safety code, because the safety code is not in evidence. I will let him answer.

"A. My opinion in this is,—I don't know whether to use the word 'duty' or 'practice.' But in my observation over previous years, the power companies and other distributors of electricity will not, knowingly, and if it is within their knowledge, deliver electricity to hazardous installations; the principal purpose of that is to protect their equipment ahead of it. In other words, in this case, the Batiste Springs Power Line and Water Supply depended upon the same circuit so it strikes me that they would hesitate, or should hesitate to supply current to a hazardous installation." (R 192-194).

IV.

The court erred in giving the italicized portion of the following instruction:

"The general rule of law is that where one furnishing and supplying electricity for a valuable consideration, merely transmits its electrical current from its line to the consumer's wires, which it did not in-

stall, and does not control, it has no duty to inspect such wires and is not liable for injuries caused by defects in them. *However, where the company knows of any defects or by the exercise of ordinary care required of a company dealing in electricity, would know of such defects, its duty is to stop and not to send its deadly current to the defective appliances or equipment of the consumer or to and through defective electrical apparatus and it is liable for injuries to person or property caused by a breach of this duty.*" (R. 374).

Objection urged at the trial, that the portion of said instruction objected to did not apply to the facts in this case because there were no defects in the substation (R 383).

V.

The court erred in giving the italicized portion of the following instruction:

"With respect to knowledge on the part of an agent which may be imputed to his principal, the law is that relevant knowledge may be acquired by an agent, either before the time of his employment or after he becomes agent. The important matter is not how the agent acquired the knowledge, but whether or not he had the knowledge when it became relevant in his work for the principal. If the agent has the information in mind at the time it becomes relevant in his work, the principal is bound equally where the knowledge was acquired privately by the agent as where he obtained it while acting as such agent. *Therefore, where the agents of a company supplying an electric current had or should have had knowledge of a hazardous and dangerous condition of wiring and ap-*

pliances maintained by a customer, and continue to furnish such current with such knowledge, if injury occurs by reason of such hazardous conditions the company is liable for injuries occurring as the proximate result of furnishing such current."
(R 375).

Objections urged at the trial, that there was nothing more hazardous or dangerous about this substation than would exist at any substation if it had been properly operated. That there is a difference between dangerous and defective condition (R 383).

VI.

The court erred in giving the following instruction:

> "If from a preponderance of the evidence, you believe that at the time of the alleged injury to LaVerl Johnson, the defendant, Union Pacific Railroad Company, was furnishing electricity to the Pacific Fruit Express Company for a valuable consideration and that the said Union Pacific Railroad Company was advised of or by the exercise of ordinary care the Union Pacific could have and should have known of the conditions that existed at the sub-station on the date of the accident, and you further find that such conditions were dangerous and hazardous to life and property and that the Union Pacific Railroad Company continued to furnish high voltage electricity through said lines and into said sub-station and that as a proximate cause thereof LaVerl Johnson was injured, then the defendant was negligent."
> (R 377).

Objections urged at the trial, that there was nothing more

hazardous or dangerous about this substation than would exist at any substation if it had been properly operated. That there is a difference between dangerous and defective condition. (R 383).

VII.

The court erred in refusing to give appellant's Requested Instruction No. 1, reading as follows:

> "You are instructed that under the evidence in this case that the plaintiffs are not entitled to recover against the defendant and you are accordingly directed to return a verdict in favor of the defendant Union Pacific Railroad Company and against the plaintiffs, LaVerl and Joleen Johnson."
> (R 37-38).

Objections urged at the trial, that it should have been given for the reason set forth in appellant's Motion for Directed Verdict (R 363-365, 383).

VIII.

The court erred in refusing to give appellant's Requested Instruction No. 6, reading as follows:

> "If you find from the evidence in this case that after the substation was constructed that it was turned over to and accepted by the Pacific Fruit Express Company who thereafter owned, operated or controlled it, then you are instructed that the defendant Railroad Company in this case, by merely furnishing

electricity to such substation, can not be held responsible for the injuries to LaVerl Johnson."
(R 38).

Objections urged at the trial, that the instruction correctly stated the law and was not otherwise given (R. 384-385).

IX.

The court erred in refusing to give appellant's Requested Instruction No. 7, reading as follows:

"If you find that plaintiff LaVerl Johnson sustained his injuries solely and proximately by reason of someone at the Pacific Fruit Express Company not pulling the switch to cut off the power to the lightning arrestors or that no one at the Pacific Fruit Express Company warned LaVerl Johnson that the power had not been cut off to the lightning arrestors then the plaintiffs are not entitled to recover and your verdict should be for the defendant. In other words, the defendant Union Pacific Railroad Company cannot be held liable for any acts or conduct on the part of the Pacific Fruit Express Company, its agents, servants or employees."
(R 38).

Objection urged at the trial, that said instruction was in accordance with the facts and the law, and was based upon the decision in 10 Fed. (2d) 66. (R 385).

X.

The court erred in refusing to give appellant's Requested Instruction No. 8, reading as follows:

> "If you find that the injuries to the plaintiff LaVerl Johnson were caused by the method of operation or the failure to properly operate said substation by the Pacific Fruit Express Company and because of that the plaintiff LaVerl Johnson was injured, then you are instructed that the action or non-action of the Pacific Fruit Express Company was the active, independent, intervening cause and hence the proximate cause of the resulting injury to the plaintiff LaVerl Johnson and your verdict must be in favor of the defendant."
> (R 38-39).

Objections urged at the trial, this instruction was in accordance with the law and the decision in 10 Fed. (2d) 66 (R 385).

XI.

The court erred in refusing to submit to the jury appellant's Special Interrogatory No. 1, reading as follows:

> "If you return a verdict in favor of the plaintiffs state how and in what manner you find that the defendant Union Pacific Railroad Company was negligent." (R 39).

XII.

The court erred in refusing to grant appellant's Motion for a New Trial (R 20-28), for the reasons set forth therein, and for the following additional reasons:

(a) That the evidence is wholly insufficient to justify the verdict for the reason set forth in paragraph II of appel-

lant's Motion for New Trial (R 21).

(b) That the verdict is grossly and monstrously excessive (R 22).

(c) That the verdict is grossly and monstrously excessive and appears to have been given under the influence of passion, prejudice, caprice, or sympathy, and shocks the sense of justice and shows an utter disregard for the instructions of the court (R 22).

XIII.

That the verdict is against the law for the reasons set forth herein (R 22).

XIV.

That the evidence is wholly insufficient to support the judgment entered on the verdict for the reasons set forth herein, and for the reasons set forth in paragraph II of appellant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial (R 20-28), and for other reasons therein set forth.

ARGUMENT

Basically the issues in this case may be stated as follows:

1. Was the appellant in fact delivering electrical energy to the Pacific Fruit Express sub-station at Pocatello at the time Johnson was injured?
2. If so, was it negligence to do that, and

3. Was such act the proximate cause of Johnson's injuries?

These three questions are answered in the negative by the facts and the law to be presently discussed.

First of all, however, and decisive in and of itself, is the fact that,

The Pacific Fruit Express Company by virtue of its lease, Exhibits 27 and 29 (R 322-333, 336-339), had exclusive possession and control of the premises on which the substation was located, and any liability resulting from the operation of the substation would be that of the lessee Pacific Fruit Express Company.

City of Lewiston vs. Isaman,
19 Ida. 653, 115 Pac. 494;

Olin vs. Honstead,
60 Ida. 211, 91 Pac. (2d) 380, 383, 384;

Goodman vs. Harris,
(Cal.) 253 Pac. (2d) 447.

In the Olin case the Supreme Court of the State of Idaho stated that it did not appear from the complaint that when the room was leased it was not a safe and proper place in which to conduct a drug store; that the danger arose from adding the stock of fireworks, and that was a detail in the conduct of the tenant's business over which the landlord had no control. The Supreme Court further stated:

> "After the period of tenancy commenced the landlord had no power, and owed no duty, to supervise his tenant's business to the end that it not be conducted in such a way as to be dangerous."

A lessor is not liable to a business invitee of his lessee even though aware of a dangerous condition existing on the premises, and could have prevented the continuance of the dangerous condition by cancelling the lease. *Goodman vs. Harris*, supra.

The railroad was not delivering electrical energy to the Express Company, and in no event was it bound to foresee or guard against the extra-ordinary conduct of the officers or agents of the Pacific Fruit Express Company and accordingly the appellant was not negligent. (Specification of Errors *I to XIV Inc.)*.

Prefacing a discussion of this subject it should be kept in mind that the sub-station in question, and the transmission line leading to it, were owned, operated and controlled by the Pacific Fruit Express Company and not the Union Pacific Railroad Company (Exhibits 30, 31, 32), (R 262-265, 250-253, 266, 273-274, 294-296, 332-333); that when it was completed in 1925, or thereabouts, it was accepted by Mr. Branum for the Pacific Fruit Express Company (R 277); that the Pacific Fruit Express was merely a co-user of electrical energy delivered to the Pacific Fruit Express and the Railroad jointly by the Idaho Power Company, but only one billing is made for the energy and that is to the Union Pacific, who bills the Pacific Fruit Express for what it uses. See Exhibit 21.

The sub-station was standard when built, and is as capable and safe now of receiving energy as it was at the time it was built (R 236-238, 345-346); there is nothing defective about it or any of the equipment in it (236-238, 345); there has never been an injury from the time it was built in 1925 until LaVerl Johnson received an injury in 1950 (R 283); the Pacific Fruit Express had the only keys to the substation, which was always kept locked, and the Railroad had no keys (R 197, 293); there were switches in the substation, not only to deenergize the transformers, but also the lightning arrestors (R 162, 175, 182-183, 239, 286, 304, 345); and if the sub-station on the day in question had been operated properly by the Pacific Fruit Express Company the injuries to LaVerl Johnson would not have occurred (R 183, 203-204, 209, 237-239, 246, 345).

There is absolutely no evidence in the record that the Railroad Company knew, or had reason to believe, that LaVerl Johnson was to go into the sub-station on Saturday afternoon, November 4, 1950, or at any other time. It could not reasonably anticipate that he or anyone else would be given the keys to enter this sub-station unaccompanied (that had never occurred before). It had no reason to believe that if he or anyone else was sent in that he or they would not be warned that the switches leading to the lightning arrestors had not been pulled or that these lightning arrestor switches would not be pulled if Johnson had any work in and about the arrestors. Neither could the Railroad anticipate that Johnson having been informed to paint wires to and from the transformers in the larger transformer cage the same as he did in the smaller

transformer cage, that he would ignore such instructions and proceed to a point 12 to 15 feet behind the transformers and take hold of a bare wire leading to the arrestors.

The Railroad was not bound to foresee and guard against such extra-ordinary conduct on the part of the Pacific Fruit Express Company, or LaVerl Johnson, and its failure to do so is not negligence.

Every person has the right to presume that every other person will perform his duty and in the absence of reasonable grounds to think otherwise it is not negligence to assume that one is not exposed to dangers which come to him only from violation of law or duty by such other person.

Leo vs. Dunham (Cal),
264 Pac. (2d) 1, 3.

In *Richards vs. Stanley* (Cal.), 271 Pac. (2d) 23, 27 the court held that in the absence of legislation imposing a duty that the owner of an automobile leaving his keys in it owed no duty to the general public to protect members thereof from risk of motoring activities of a thief, the court said:

> "Thus a duty to prevent such harm would involve more than just the duty to control the car, it would involve a duty to prevent action of a third person."

A defendant "is not responsible for a consequence which is merely possible according to occasional experience, but only for those consequences which are probable according to ordinary and usual experience."

Garrison vs. St. Louis & S. F. Ry. Co. (Kan.), 271 Pac. (2d) 307, 311.

In *Probart vs. Idaho Power Company,* 74 Ida. 119, 258 Pac. (2d) 361, the court in holding that the Power Company was not negligent stated that a Power Company could not be held negligent for failing to anticipate that persons operating cranes and derricks on the highways or streets, may raise them to an unsafe height and contact overhead wires:

> "Under such conditions the law only requires the company to reasonably guard against probabilities, not possibilities."

In *Atchison T & S. F. Ry. Co., vs. Calhoun,* 213 U. S. 1, 53 L. Ed. 671, the principle involved was the same as in the case at Bar. In that case the railroad had in the dark left a baggage truck standing on the very end of the platform at a place where it could hardly be anticipated that passengers would alight, and a person running along the side of a moving train attempting to hand Mrs. Calhoun's baby to her stumbled over the baggage truck, injuring the baby. Plaintiff had judgment, which the United States Supreme Court reversed. Quoting from Pollock on Torts, the court in part said:

> "The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely on the known course of things."

In *Cole vs. German Sav. & L. Soc.,* 124 Fed. 113, 63

L. R. A. 416, the defendant was sued as a result of its alleged negligence in the operation of an elevator. As plaintiff passed through a hall, a boy who had been riding and visiting with the elevator operator hurriedly passed the plaintiff, seized the sliding door to the elevator shaft, pushed it back as far as it would go and stepped back. The plaintiff, supposing the boy was the operator of the elevator stepped into the shaft and fell about ten feet and was injured. A recovery to the plaintiff was by the court denied. The decision in our opinion sets forth the principals of law which are applicable to the facts in the case at Bar. It defines intervening cause and held that the injury to the plaintiff was the natural and probable consequences of the act of the boy who proceeded the plaintiff to the elevator and that his act was the moving and efficient cause, without which the accident would not have occurred. The court said:

> "There is no evidence in this case that any such accident or injury as that from which the plaintiff suffers ever followed the defendant's acts of negligence before the plaintiff fell into the well. Not only this, but there is no evidence that the accident and injury to the plaintiff resulted from these acts or omissions, but positive and convincing testimony that they were produced by the wrongful act of another."

In the case at Bar the facts are undisputed that this substation had operated satisfactorily for a period of twenty-five years, and the injuries to LaVerl Johnson would not have occurred except for the acts and conduct of the officers or agents of the Pacific Fruit Express.

The Cole case has been cited a great many times, and has been cited with approval by the Idaho Supreme Court in the case of *Antler vs. Cox* 27 Ida. 517, 149 Pac. 731. In that case the plaintiff alleged an unsafe and unsuitable condition of a chain, which curled and twisted about in a manner that the trail hook struck the plaintiff when a horse ran away. There was testimony that the appliance of the chain furnished to the plaintiff was not the same as those generally used, or which was ordinarily or customarily used for such work. The court in citing the Cole case said:

> "The rule is thoroughly established by the authorities that proximate causes are such as are the ordinary and natural results of the omission or negligence complained of, *and are usual and might have been reasonably expected to occur.*" (emphasis ours).

What occurred in the case at Bar was neither usual nor could it have been expected to occur. The court in the Cox case further said:

> "There is no evidence to show that it was dangerous when used in the manner contemplated, and when the horse was not running away."

So, in the case at Bar, there was no danger from the act of letting electrical energy go into the substation. It became dangerous only because of the acts or omissions of the Pacific Fruit Express Company, as we have related.

In *Hair vs. City of Lynchburg* (Va.) 181 S. E. 285, 287, the plaintiff was injured in a swimming pool that had been built in 1921 and used every year after that until plaintiff's

accident in 1931, during which time no accident had occurred. The court in denying a recovery to the plaintiff stated that the construction and operation of the pool was reasonably safe for those who exercised a like degree of care in making use of it. The court quoted from 22 RCL 124, the pertinent part of which is as follows:

> "The natural and probable consequences are those which human foresight can foresee, because they happen so frequently that they may be expected to happen again. The possible consequences are those which happen so infrequently that they are not expected to happen again."

Negligence of the Railroad cannot be predicated on the theory it was delivering electrical energy to the Pacific Fruit Express Company, or upon any other theory. (Specification of Errors I to XIV, Inc.).

Appellant was not a producer of the energy and neither did it deliver it. The Pacific Fruit Express Company was permitted for its own benefit to tap a line onto the Railroad Batiste Line and obtain power under a combined load from the Idaho Power Company at a cheaper rate than previously, because it could share in the total taken by both the Pacific Fruit Express Company and the Oregon Short Line Railroad Company (Ex. 26, R 314-319).

The transmission line to the substation, and the substation, served no railroad facilities or purpose. When the power reached this transmission line it was the exclusive product of the Pacific Fruit Express Company and under its control. Appellant had nothing to do with it or about it. The

Pacific Fruit Express Company had the means and ability to control it and shut off all power in the sub-station by using available switches at the sub-station, which was owned, operated and controlled by the Pacific Fruit Express Company. That the Railroad and the Pacific Fruit Express Company were merely co-users of power from the Idaho Power is also established by respondent's Exhibit No. 21. The only duty appellant owed was to the Pacific Fruit Express Company to permit the latter to obtain its power under a combined load from the Idaho Power Company by tapping a line onto the railroad line, which, of course, involved no duty on the part of the appellant to respondent LaVerl Johnson, or anyone else working at or about the substation, or elsewhere on Pacific Fruit Express Company premises.

Palsgraf vs. Long Island R. Co.,
248 N. Y. 330, 162 N. E. 99, 59 A.L.R. 1253.

The respondents never proved, and could not prove, that the appellant owed any duty to LaVerl Johnson. Accordingly appellant was not negligent or liable.

Chatterton vs. Pocatello Post,
70 Ida. 480, 223 Pac. (2d) 389, 20 A. L. R. (2d) 783;

Northern R. Co. vs. Page,
274 U. S. 65.

Nevertheless, even assuming for the sake of argument that it was furnishing the energy, it still was not negligent. The sub-station and the transmission line to it were owned,

operated, controlled and maintained by the Pacific Fruit Express Company, and under such circumstances the Railroad is not responsible for injuries to persons on such premises.

The rule is well stated in *20 C. J.*, page 364, Section 49, as follows:

> "*Companies and persons Liable.*—1. *Ownership and Control of Appliances.* Where wiring or other electrical appliances on private premises are owned and controlled by the owner or occupant of such premises, a company which merely furnishes electricity is not responsible for the insulation or condition of such wiring or appliances and is not liable for injuries caused by their defective condition, to such owner or occupant, or to third persons on such premises. A like rule has been applied to the poles and wires of a distributing company to which a generating company sells and delivers electricity for distribution and sale to the patrons of the distributing company. The fact that the injury occurred on a street or highway does not alter the rule. The duty and responsibility of a mere generating company is limited to making a proper connection and delivering the electric current to the purchaser's wires and appliances in a manner which, so far as such delivery is concerned, protects life and property, and there is no duty of inspection to see that the purchaser's wires and appliances are in a safe condition and kept so. * * * "

See also 29 C.J.S. 611, Sec. 57 A;

18 Am. Jur. 498, Sec. 102.

This Rule is also set forth and annotated in *134 A. L. R.* with propositions of law stated at pages 508, 511, 515, 517 and 518. As mentioned on page 526 of the Annotation, there

are some cases where there may be liability when electricity is supplied by a company having knowledge of "defective condition of wiring and appliances maintained by the consumer," but we have found no cases which have held a defendant, such as the Railroad Company in this case, liable where it merely permits another to take power from its line.

See—*Kelly vs. Duke Power Company (4 Cir.)* 97 Fed. (2d) 529.

In the case at Bar, there were no defects. Other cases supporting the proposition are,—

Benard vs. Vorlander, (Cal. DCA) 197 Pac. (2d) 42, 45;

City of Cushing vs. Presbury (Okla. 1941), 109 Pac. (2d) 1077;

Hill vs. Pacific Gas & Elec. Co., (Cal.) 136 Pac. 492;

Mullican vs. Meridian Light & R. Co., (Miss.) 83 So. 816, 9 A.L.R. 165;

Perry vs. Ohio Valley Elec. R. Co., (W. Va.) 74 S.E. 993;

Roberts vs. Pac. Gas & El. Co., (Cal. DCA) 283 Pac. 353;

Irelan-Yuba Gold Quartz M. Co., vs. Pacific Gas & Elec. Co., (DCA Cal.) 105 Pac. (2d) 616;

Hoffman vs. Leavenworth Light, H & P. Co., (Kan.) 138 Pac. 632, 50 L.R.A. (NS) 574;

Minneapolis General Electric Co. vs. Cronon, 166 Fed. 651, 20 LRA (NS) 816;

Pressley vs. Bloomington-Normal Ry. & Light Co., (Ill.) 111 N.E. 511.

Memphis Consol. Gas & Elec. Co., vs. Speers, (Tenn.) 81 S.W. 595;

Burns vs. Carolina Power & Light Co., (4 Cir.) 193 Fed. (2d) 525.

In *Benard vs. Vorlander,* supra, the court held that a company merely selling electrical power transmitted through its facilities owned and maintained by others upon their own property, in the absence of a request to do so, was not required to shut off its power because the owner of such property had commenced the construction of a building so close to the lines as to endanger workmen engaged in such work.

In *Hoffman vs. Leavenworth Light, H & P. Co.,* supra, where judgment for the plaintiff was reversed, the court stated that where power is merely furnished to a responsible party who owned and controlled the poles, wires and appliances which were "in proper condition to receive the current safely," that the furnishing party was not required at its peril to see that such equipment was kept safe, but only be liable if charged with knowledge "of defects." In the case at bar there were no defects.

In *Minneapolis General Electric Co., vs. Cronon,* supra, we think that decision upon the facts in that case and the principle involved, could be paraphrased to fit the case at bar as follows:

> "The substation was constructed by the OSLRR Co., (not a party to the action) in 1925; owned and operated by the Pacific Fruit Express; its construction was neither improper or imperfect, it was standard when constructed, it was not defective, it was capable of operating as a substation on the day of the accident, the same as when constructed, and it became dangerous to Johnson only because of the acts or omissions of the Pacific Fruit Express Company, by one of its agents giving him a key to go in unattended to paint leads to and from the transformers (not the lightning arrestors), and advising him the power was off, when as a matter of fact only the transformers had been de-energized, and the lightning arrestors still alive, without pulling the disconnect switches to the lightning arrestors. So there is no reasonable escape from the conclusion that the immedate cause of Johnson's injuries was the energized condition of the lightning arrestors, the direct fault of which was the Pacific Fruit Express over whose action the Union Pacific had no right of control."

In *Memphis Consol. Gas & Elec. Co. vs. Speers,* supra, where judgment for the plaintiff was reversed, the court said:

> "We understand that liability for an injury occasioned through such a defect depends upon the interest in or control over the appliances in which the defect exists, and, if there is neither interest nor control, there would be none."

In *Burns vs. Carolina Power & Light Co.,* supra, the defendant was held not liable, and, as the court remarked:

> "This terrible and tragic accident came about as a result of negligence on the part of the brick yard employees."

After the construction of the substation by the Oregon Short Line Railroad Company, and its acceptance by Mr. Branum on behalf of the Pacific Fruit Express Company, it was the responsibility of the Pacific Fruit Express to maintain and operate it, and as a result of its operation it alone would be responsible for injuries occurring.

Goar vs. Village of Stephen,
(Minn.) 196 N.W. 171;

Bogoratt vs. Pratt & Whitney Aircraft Co.,
(Conn.) 157 A. 860.

Howard vs. Reinhart & Donovan Co.,
(Okla.) 166 P. (2d) 101.

In the Bogoratt case the court said:

> "When he accepts work that is in a dangerous condition, the immediate duty devolves upon him to make it safe; and if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury."

The court, of course, correctly instructed the jury that the appellant could not be held responsible for any of the acts of the Pacific Fruit Express Company.

Perry vs. Ohio Valley Elec. R. Co.,
(W. Va.) 74 S.E. 993;

14 C. J. 58, Sec. 19;

14 C. J. 873, Sec. 1332.

As we shall presently show, if we have not already done so, it was the conduct of the Pacific Fruit Express Company that was the active, independent, and intervening cause and hence the proximate cause of LaVerl Johnson's injuries.

The proximate cause of Johnson's injuries was the acts or omissions of the Pacific Fruit Express Company. (Specification of Errors I, II, VII, IX, X, XII, XIII, XIV).

LaVerl Johnson was not an employee of the appellant. It had no control over him, or for that matter over the substation or the transmission line. He was employed by the Pacific Fruit Express Company, a co-user of electrical energy obtained from the Idaho Power Company.

Assuming, but not admitting, negligence, the facts of the case and the applicable law compel a conclusion, as a matter of law, that the proximate cause of LaVerl Johnson's injuries was the unusual careless conduct of the Pacific Fruit Express Company's officers and employees.

The court instructed the jury as follows:

> "The proximate cause of injury is that which in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, and without which the injury would not have occurred." (R 372).

This is probably the usual definition of proximate cause and while general in its nature it establishes under the facts in this case that appellees failed to prove the appellant negligent, or if, by a stretch of the imagination, it might be thought

the appellant was negligent, the appellees failed to prove or establish that any such negligence was the proximate cause of the injuries.

The fact that electrical energy was going into this substation would not have caused injury to Johnson had it not been for the acts and conduct of the Pacific Fruit Express Company's officers or agents.

The natural and continuous sequence, of electrical energy going into the substation was definitely broken by a new and independent cause—acts or omissions of the Pacific Fruit Express Company previously mentioned and which the Railroad could not reasonably foresee. Other Pacific Fruit Express men were in the substation the morning of the accident but they were warned that the power was still alive in the arrestors (R 310, 313). Three Pacific Fruit Express men were in the substation, and one was a Pacific Fruit Express electrician (Judge). The switch to deenergize the transformers was pulled but not the switches to the arrestors. If any one knew what the Pacific Fruit Express Company was going to do in the substation that day it was these three men, yet neither of them foresaw any danger in leaving the switches to the arrestors connected. Later H. O. Johnson told LaVerl he wanted him to paint the cables or wires to and from the transformers; nothing was said about the arrestors, and according to LaVerl, H. O. Johnson told him the power was off in the substation. That was incorrect.

Neither H. O. Johnson, nor anyone else from the Pacific Fruit Express, told anyone on the Railroad what was to be

done or that LaVerl was going into the substation to paint cables or wires to or from the transformers and that he might misconstrue his instructions and paint a bare wire leading to the live arrestors. In the absence of advice to the contrary the Railroad had every right to assume that the station would be properly operated as it had been since construction was completed, or for a period of twenty-five years.

An injury that is not the natural consequence of the negligence complained of and that would not have resulted from it but for the interposition of some new, independent cause that could not have been anticipated is not actionable negligence and accordingly all of the acts or failures to act on the part of the Pacific Fruit Express Company's officers or agents (and they had control of the injured Johnson and also owned, operated and controlled the substation), were the active, independent, intervening and superseding causes, without which the injuries to LaVerl Johnson would not have occurred.

United States vs. Rothschild International Steve. Co.
(9th Cir.) 183 Fed. (2d) 181;

Splinter vs. City of Nampa,
74 Ida. 1, 256 Pac. (2d) 215;

Chatterton vs. Pocatello Post,
70 Ida. 480, 223 Pac. (2d) 389;

Antler vs. Cox,
27 Idaho 517, 149 Pac. 731;

Clark vs. Chrisop,
72 Ida. 340, 241 Pac. (2d) 171;

Atchison, T. & S. F. Ry. Co., vs. Calhoun,
213 U.S. 1, 53 L. Ed. 671;

Cole vs. German Sav. & L. Society,
124 Fed. 113, 63 L.R.A. 416;

Hair vs. City of Lynchburg,
(Va.) 181 S.E. 285, 287.

We have heretofore discussed the cases of Cole vs. German Sav. & L. Society and also Antler vs. Cox, under the heading of negligence. These two cases, in our opinion, tell us that there was no negligence on the part of the appellant in the case at Bar, but also that the acts or omissions of the Pacific Fruit Express Company were the proximate cause.

The authorities just referred to deal directly with intervening cause, and it is interesting to note that this court and the Idaho Supreme Court have announced the principle of intervening cause so clearly and effectively as to leave no doubt but that the acts or failure to act on the part of the Pacific Fruit Express Company's officers or agents constitute the proximate cause of the injuries to LaVerl Johnson.

In *United States vs. Rothschild International Steve. Company,* supra, this court stated that the question there presented was whether the United States or Rothschild were proximately responsible for injuries to one Dillon. Rothschild permitted Dillon to work where it knew there was a defect, relying upon a chance nothing would happen, which except for a defect was almost the identical situation as between Pacific Fruit Express and LaVerl Johnson. In the Rothschild case this court held that the proximate cause was the negli-

gence of Rothschild, and in support of the decision quoted from Restatement of Torts, Section 441, as follows:

> "The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is liable for another's harm are usually, but not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actor's negligence is often called passive negligence, while the third person's negligence, which sets the intervening force in active operation, is called active negligence."

In the following paragraph (c) of Section 441 of Restatement of Torts it is stated:

> "An independent force is one the operation of which is not stimulated by a situation created by the actor's conduct. An act of a human being or animal is an independent force if the situation created by the actor has not influenced the doing of the act."

The text following the above quoted portion contains an applicable situation, and reads as follows:

> "* * * if A so loads his truck that any slight jolt may cause a part of its heavy contents to fall and, while B is trying to pass the truck, his car skids and sideswipes the truck so slightly that, were the truck properly packed, no harm would be done by it but because of the careless packing of the truck, it causes a heavy piece of machinery to fall on a pedestrian, the act of B is an independent intervening force."

In the case at Bar A would be the Railroad, and B would be the Pacific Fruit Express Company.

We think the Idaho Supreme Court has also decided this question in favor of appellant in *Antler vs. Cox,* previously discussed, but very recently the Court had occasion to consider the question of intervening and superseding causes, in *Splinter vs. City of Nampa,* supra, where it held that the City of Nampa was not liable when it permitted a butane tank to be installed in an alley and an explosion occurred while it was being filled. The court laid down some patent rules of law, such as that an inference could not be based upon an inference, nor a presumption on a presumption; that where the proven facts are equally consistent with the absence, as with the existence, of negligence on the part of the defendant, the plaintiff had not carried the burden of proof and cannot recover, and in disposing of the case the court said:

> "When a city grants a permit for an installation, or the doing of work, in its streets or alleys, if the installation or work is such that it becomes dangerous only by reason of negligence on the part of the permittee, in the manner in which the thing is done, or in subsequent operation of the installation, the permittee is liable, not the city, * * * Assuming that the evidence would support an inference of negligence on the part of the city in the location of the tank, and bearing in mind that there is no evidence of any failure or breakage which caused any leaking to occur at the tank, prior to the explosion, the only remaining possible inference of negligence involving the city would be negligence on the part of the operator in filling the tank. In other words, while an insignificant amount of gas will ordinarily escape in the filling of

> the tank, the loss of a dangerous amount (in the absence of the failure of equipment) could result only from negligence of the operator. *Under the circumstances such negligence would be the negligence of the permittee in the operation of the installation. It would be the active, independent, intervening cause, and hence the proximate cause, of any resulting injury"* (emphasis ours).

Equally important is the case of *Chatterton vs. Pocatello Post,* supra, where the plaintiff was denied a recovery on the theory that defendant's negligence, if any, was not the proximate cause of the injuries to Chatterton.

The court said:

> "It may be stated as a general rule that negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by which the injuries are inflicted is not the proximate cause thereof. 38 Am. Jur. 702. * * * and where an *intervening act of force is put in motion by another, and for which defendant is not responsible, there can be no recovery,"* (emphasis ours).

The Idaho Supreme Court in *Stearns vs. Graves,* 62 Ida. 312, 111 Pac. (2d) 882, 886, held that:

> "There can be but one *proximate* cause, although that need not, in all cases, be the *sole* cause."

and just prior to this statement, said:

> "* * * It is generally understood in negligence cases that the final cause immediately antecedent to the infliction of the injury is the *proximate* cause of the injury."

In the case at Bar the final cause immediately antecedent to the infliction of the injury to Johnson were the various acts and omissions of the Pacific Fruit Express.

It is our opinion that the foregoing authorities are amply sufficient to compel, as a matter of law, a holding that appellant is not liable. There are, however, many other authorities in support of our position, the big majority of which are electrical energy cases.

Polloni vs. Ryland,
(Cal. App.) 151 Pac. 296, 298;

Stasulat vs. Pac. Gas & Elec. Co.,
(Cal.) 67 Pac. (2d) 678;

Stackpole vs. Pac. Gas & Elec. Co.,
(Cal.) 186 Pac. 354;

Hauser vs. Pacific Gas & Elec. Co.,
(Cal. App.) 23 Pac. (2d) 1068;

Hayden vs. Paramount Productions,
(Cal. App.) 91 Pac. (2d) 231;

Georgia Power Co., vs. Kinard,
(Ga.) 170 S.E. 688, 691;

Harter vs. Colfax Electric Light & Power Co.,
(Iowa) 100 N.W. 508;

Kentucky Utilities Company vs. Sutton's Admr.,
(Ky.) 36 S.W. (2d) 380;

Leavitt vs. Stamp,
(Ore.) 293 Pac. 414;

Seith vs. Commonwealth Electric Co.,
(Ill.) 89 N.E. 425;

Johnson vs. Union Furniture Company,
(Cal. DCA) 87 Pac. (2d) 917;

Goar vs. Village of Stephen,
(Minn.) 196 N.W. 171;

Davis vs. Carolina Cotton & Woolen Mills Co.,
(4 Cir.) 5 Fed. (2nd) 575, 576;

1 Shearman and Redfield on Negligence 101,
Sec. 37;

Howard vs. Reinhart & Donavan Co.,
(Okla.) 166 Pac. (2d) 101;

City of Okmulgee vs. Hemphill,
(Okla.) 83 Pac. (2d) 189;

Girard vs. Monrovia City School Dist.,
(Cal. DCA) 264 Pac. (2d) 115;

Gerber vs. McCall,
(Kan.) 264 Pac. (2d) 490, 493.

In *Stackpole vs. Pacific Gas & Electric Co.,* supra, the court said:

> "It was not the delay in setting back the wires that killed the decedent, but the moving in of the piledriver before they were set back and were safely out of the way."

In *Harter vs. Colfax Electric Light & Power Co.,* supra, where the wires in a hotel were unsuitable, and unsafe because of defective installation, the court said:

> "Plaintiff's theory seems to be that when the wire fell

upon him a short circuit was created, which did the damage complained of. This was due, not to defendant sending a dangerous current into the house, but to something over which it had no control, and for which it was not responsible."

In *Johnson vs. Union Furniture Co.*, supra, the court adopted the following rule of law:

"One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, * * * is only remotely and slightly probable."

The transmission of energy to the substation, irresepective of how it got there or who was responsible for getting it there merely furnished a condition, which would not constitute the proximate cause.

Chatterton vs. Pocatello Post,
70 Ida. 480, 223 Pac. (2d) 389;

Rowe vs. Northern Pacific Ry.,
52 Ida. 649, 17 Pac. (2d) 352;

Hauser vs. Pacific Gas & Electric Co.,
(Cal. App.) 23 Pac. (2d) 1068;

Leavitt vs. Stamp,
(Ore.) 293 Pac. 414;

Seith vs. Commonwealth Elecric Company,
(Ill.) 89 N.E., 425;

Orton vs. Pa. R. Co.,
(6 Cir.) 7 Fed. (2d) 36;

Hart vs. Wabash R. Co.,
(7 Cir.) 177 Fed. (2d) 492;

The manner and method of the operation of the substation by the Pacific Fruit Express Company prior to and at the time LaVerl Johnson was sent into the substation by the officers and agents of the Pacific Fruit Express Company to work constituted the proximate cause.

Splinter vs. City of Nampa,
74 Ida. 1, 256 Pac. (2d) 215;

Antler vs. Cox,
27 Ida. 517, 149 Pac. 731;

Stackpole vs. Pacific Gas & Electric Co.,
(Cal.) 186 Pac. 354;

Georgia Power Co., vs. Kinard,
(Ga.) 170 S.E. 688, 691;

Leavitt vs. Stamp,
(Ore.) 293 Pac. 414;

Woodruff vs. Bowen,
(Ind.) 34 N.E. 1113;

Pittsburgh SS Company vs. Palo,
(6 Cir.) 64 Fed. (2d) 198, 200, 201.

The Railroad could not foresee that Johnson, when told to paint the same type of leads in and out of the transformer that he had been painting in the small substation in the morn-

ing would pass by the transformers, go around to the rear of the substation and start painting a bare wire leading to the lightning arrestors without making inquiry concerning whether such wires were dead or alive. It was a foolhardy thing for him to do and we think his act was also the proximate contributing cause.

Stoffel vs. N.Y. N.H. & H.R. Co.,
(2 Cir.) 205 Fed. (2d) 411.

We think that if the jury considered the question of negligence at all that it must have found negligence merely from the fact that an accident occured and that Johnson was severely injured, or that it found the appellant liable by looking backward, which, of course, cannot be done.

Greene vs. Sibley, Lindsay & Curr Company,
(N.Y.) 177 N.E. 416 (Judge Cardozo);

Sitarek vs. Montgomery,
(Wash.) 203 Pac. (2d) 1062.

The situation must be considered before and not after the event.

Maue vs. Erie Railway Co.,
91 N.E. 629, 631;

North Chicago St. R. Co., vs. O'Donnell,
115 Ill. A. 110, 112;

Berlin vs. Wall,
95 S.E. 394, 397;

Dwyer vs. Hill,
79 NYS 785, 786;

Johnson vs. New York,
101 N.E. 691, 693.

Proof of a bare possibility that injury may have been due to a given cause does not justify a finding that it was so caused (or submission of the question to the jury), but evidence must furnish some logical basis for a finding that the result was due to such cause.

Macaw vs. Oregon Short Line RR Co.,
49 Ida. 151, 286 Pac. 606.

The weight of the evidence must be more than a scintilla before the case may be properly left to the discretion of the trier of fact and bare possiblity is not sufficient. Events too remote to require reasonable prevision need not be anticipated.

Brady vs. Southern R. Co.,
320 U.S. 477;

Hoffer vs. City of Lewiston,
59 Ida. 538, 85 Pac. (2d) 238.

The case for appellee is left without any substantial support in the evidence and the verdict can rest only upon mere speculation and conjecture, which cannot supply the place of proof.

Pennsylvania R. Co., vs. Chamberlain,
288 U.S. 333, 77 L. Ed. 819;

Moore vs. Chesapeake & O. Ry. Co.,
184 Fed. (2d) 176, 179; affirmed in 340 U.S. 573, 95 L. Ed. 547, 550-551.

Accordingly appellant's Motion for Directed Verdict should have been granted or the trial court should have granted appellant's Motion for Judgment Notwithstanding the Verdict.

The verdict is monstrous and grossly excessive from every viewpoint and the trial court should have granted appellant's Motion for New Trial (Specification of Errors *XII, XIII, XIV).*

We respectfully submit that the jury arrived at the amount of the verdict in this case without due consideration to the facts and the law, and the size of it can only be accounted for as the result of passion, prejudice, pity or sympathy. We think it must shock the sense of justice and cannot be upheld under any theory.

The amount of $225,000.00 put out at interest at as low a rate as 2½% will bring in $5,625.00 per annum, or $2,000.00 per year more than Mr. Johnson was earning at the time of the accident ($3,600. R 53); at 3% the amount would be $6,750.00, or nearly twice his yearly salary. This gives sufficient leeway for any anticipated increase in salary and would permit him to live off the interest alone and at his death would leave the principal unimpaired and an estate of $225,000.00. Such a result is not in accord with the legal principles governing the award of compensatory damages for personal injury.

If we should apply the legal interest rate of 6% to this figure the annual amount would be $13,500.00. That was done by the Idaho Supreme Court in the case of *Neil vs. Idaho & W. N. RR.*, 22 Idaho 74, 125 Pac. 331. The verdict in that case was set aside and in doing so the court stated:

> "It is next contended that the verdict of $35,000 is excessive, and shows that it was rendered through passion and prejudice and without due deliberation. The respondent testified that he was 40 years of age; that his salary as a conductor averaged about $125.00 a month, which, if he worked continuously every month in the year, would amount to $1,500.00 a year. The amount of the verdict, $35,000, if put at interest at 7 per cent, would give a return of $2,450.00 per year, which would probably be double the amount the respondent would earn, taking it one year with another, and at the death of respondent would leave $35,000. The amount of the verdict is so excessive that it leads us to believe it was rendered through prejudice and passion and without deliberation."

While this case was decided many years ago and the value of the dollar has undoubtedly decreased (offset by the spiral of wages) since that case was decided, nevertheless the principle still exists, that the verdict in this case is so excessive as to leave no question but that it was rendered through prejudice, passion, or sympathy, and without due deliberation, and that the court's instructions with reference to the measure of damages or the elimination of sympathy were not followed.

We arrive at the same result if we look at the verdict from another angle. Using the Present Value Annuity Table, 3

Idaho Code 387, and a discount rate of 3%, for forty years life expectancy (R 213-214) the value of a dollar is found to be 23.1148, which, multiplied by $3,600.00, Johnson's yearly salary, produces a figure of $83,213.28, which would provide an annuity for him for forty years and takes care of his loss of wages, assuming he would work all of the time the next forty years, which is, of course, inconceivable. *Neil vs. Idaho W.N. RR.* supra, and *Denbeigh vs. O.W.R. & N.*, 23 Ida. 663, 132 Pac. 112, and would then, after deducting this amount from the verdict, leave the sum of $141,787.00 to cover all other legal damages, which amount is so excessive for that feature of the case as to show passion, prejudice or sympathy without any question. This amount, however, could also be put out at interest at 2½% and produce a yearly income of $3,544.68, which is practically the amount of Johnson's yearly salary; or at 3% the amount of $4,253.61; again leaving the principal amount of $141,787.00 intact.

The present value of aggregate future payments must be ascertained, and for this purpose annuity figures are utilized by following definite interest calculations upon which such present value is ascertained, and under circumstances such as exist in this case the adoption of a discount figure of 4% is warranted. *Holliday vs. Pacific-Atlantic SS Company,* 117 Fed. Supp. 729, 735.

Therefore, using the same present value annuity table at a discount rate of 4% (this is the figure the legislature said is to be used in figuring lump sum settlements under the Workmen's Compensation Law 72-321 I.C.); the value of the dollar for the fortieth year is 19.7928, which multiplied by

Johnson's yearly salary of $3,600.00 produces a figure of $71,254.00, which would again provide him with an annuity for forty years, and deducting that amount from the verdict of $225,000.00 leaves the sum of $153,746.00 for damages other than loss of earnings. Again, this amount put out at interest of 2½ % would produce a yearly income of $3,843.65; or at 3% would produce a yearly income of $4,612.38, which is more than Johnson's annual salary at the time of the accident; and would still leave intact the principal amount of $153,746.00 at the time of his death, and, of course, in addition to this he would also be drawing his annuity first provided for, free probably of any deductions.

> "We think it unreasonable to suppose or presume that Mr. Kellerher would have maintained an earning ability to that extent for that period of time, or that he could have earned monthly wages which, when reduced to their present value, would be worth $70,000.00. In our opinion, the amount of the verdict exceeds any rational appraisal or estimates of the damages sustained by the parties in whose behalf this action was brought."
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> *Kellerher vs. Porter,*
> (Wash.) 189 Pac. (2d) 223, 232.

The amounts discussed eliminate from consideration the following items which are normally present,—take home pay, sickness, lay-offs, labor disputes, seniority features, reduction in forces, lessened earnings, accidental death, or other factors which normally occur in a man's period of employment.

The amount of the verdict is such that it amounts to a penalty, or constitutes punitive damages; elements not present in this case. There is no way to account for the size of the verdict except that it was arrived at by passion, sympathy, or prejudice.

Before discussing this court's decision in the case of *Southern Pacific Co., vs. Guthrie* (9 Cir.) 186 Fed. (2d) 926, we would like to refer to this court's opinion in the case of *Cobb vs. Lepisto,* 6 Fed. (2d) 128, where the court held that the verdict was grossly excessive and required the granting of a new trial, and the case of *Virginian R. Co., vs. Armentrout* (4th Cir.) 166 Fed. (2d) 400, 4 A.L.R. (2d) 1064, where a verdict for $160,000.00 for a thirteen months old child who had both hands and a portion of the arms cut off was set aside and a new trial granted.

This court in the Guthrie case discussed these two decisions and held that they were correctly decided, but in the Guthrie case did not order a new trial because the verdict was deemed to be only excessive and was not grossly excessive or monstrous, as we understand the opinion.

The Armentrout case, in our opinion presents a more severe situation than the case at Bar, for involved in that case was a thirteen months old child with both hands and a portion of the arms cut off. The court in that case determined that the verdict was excessive and used the present worth of a dollar in arriving at a solution. In that case the court remarked that the amount of the verdict based on a conservative estimate of a return of 3% would pay the child $4,800.00 per year as

long as he lived, and enable him to leave the entire recovery of $160,000.00 intact at his death. It was stated that the West Virginia Workmen's Compensation Law provided maximum compensation of $18.00 per week, or $936.00 per year. (In Idaho, and in the present case, Johnson receives $22.00 per week, or a total of $1,144.00 per year).

The court remarked that the child had been terribly injured and the jury must do its best to estimate the earnings; also that it should consider "that the child is bright and intelligent and with proper education may be able to develop high earning capacity in intellectual pursuits." And, of course, there is the same evidence in the case at Bar.

In the Guthrie case this court stated that a plaintiff should not be placed in a better position financially than he would have been if he had continued to work, and secondly, that the earning power of money should be calculated at not less than three percent (page 927). On this basis Guthrie obtained about $40,000.00 damages other than for his loss of earnings, which this court agreed was too high, but not high enough to say "it was grossly excessive" or "monstrous."

In the case at Bar calculating earning power of money at 3% gives Johnson an annual salary of $3,600.00 for the rest of his life for an amount of $83,213.28, which deducted from $225,000.00, leaves $141,786.72 for all other damages. If this court thought that $40,000.00 was too high in the Guthrie case, we think there can be no doubt but that in this case the verdict is monstrous where the figure instead of being $40,000.00 is $141,787.00. We think there can be no question but that the verdict was arrived at through pity,

sympathy, passion or prejudice and was not based upon compensation for his injuries, and a new trial must be had.

Minneapolis, St. P. S. St. M. Ry. vs. Moquin,
283 U.S. 520.

The rules laid down in the Guthrie case demonstrate that the trial court erred in not granting a new trial because the verdict is against the clear weight of the evidence and results in miscarriage of justice, as the court says:

> "The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." Note 10, page 932, 186 Fed. (2d).

In Note 11, page 933, it is stated that the victim of an excessive verdict "is entitled to relief at the hands of the trial judge."

Other cases in point are:

Ford Motor Company vs. Mahone (4th Cir.) 205 Fed. (2d) 267, where the verdict was for $234,330.00, which was so excessive the court held the trial Judge should have set it aside instead of merely requiring a remittitur as a condition for allowing it to stand. There were other features in the case which helped to bring about perhaps sympathy or prejudice, nevertheless where a verdict cannot be accounted for except for sympathy, prejudice or pity the same rule obtains.

Jones vs. Pennsylvania R. Co., 182 S.W. (2d) 157, a verdict for $203,167.00 was set aside because the court

thought it was the result of passion or prejudice. Jones apparently was in a much worse condition than is Johnson.

Loftin vs. Wilson (Fla.) 67 So. (2d) 185, where a verdict for $300,000.00 was set aside, and in which case the court also refers to the case of *Florida Power & Light Company vs. Watson,* 50 So. (2) 543, wherein the court set aside an award of $260,000.00 and ordered a new trial.

In the case at Bar the verdict is 62 times the amount of Johnson's annual earnings and nearly twice as much as he could have earned over a period of forty years if he worked all of the time and his salary had remained constant. Such a situation shocked the conscience of the court in *Mo. K-T R. Co. of Texas vs. Ridgway* (8th Cir.) 191 Fed. (2d) 363, 368, and in which a verdict for $98,800.00 was set aside and a new trial granted.

Johnson was, of course, seriously injured, and he has also made a remarkable recovery for a person injured as he was; that he is intelligent is evidenced by what he has accomplished since the accident.

He was first fitted with artifical limbs in July 1951 (R 53); entered and finished summer school at Idaho State College in 1951 (R 50, 51), and started driving an automobile the latter part of 1951, and, of course, has a driver's license (R 61).

Dr. Nelson testified that Johnson had had very little trouble with the stumps or artificial limbs after June 30, 1952, except for a little irritation a week before trial (R 152), and that he will have some chafing in the future, so that there

will be about one week a year that he cannot wear the legs (R 158).

Johnson can attach the artificial legs himself. He did it in the Doctor's office (R 154). As a matter of fact, Johnson progressed perhaps better than ordinary (R 159). In addition to going to school at Idaho State College and driving his own automobile (R 61), he is also selling ads for the Intermountain Alameda Enterprise (R 53). So, notwithstanding Johnson's serious injuries and handicaps as has been demonstrated, he is not going to remain idle. His studies no doubt will lead to the practice of law or will fit him for some other line of business, so that it cannot be said his earning capacity is entirely gone.

The court erred in permitting appellees' witness Elmer V. Smith to testify, over appellant's objection, to the duty of one furnishing electricity. (Specification of Error III).

The question, the objection, the ruling of the court, and the answer of the witness are fully set forth under Specification of Error No. III, and for the sake of brevity will not be further repeated here.

That this question and answer invaded the province of the court and the province of the jury is clear. It permitted the witness to state that there was some duty on the part of the appellant to discontinue service, permitting the witness to pass upon the merits of the complaint and in effect to make a conclusion on the whole case.

We think the law is all one way on the subject, as is stated in *2 Jones on Evidence,* 4th Ed., pages 698, 699, as follows:

"* * * whatever liberality may be allowed in calling for the opinion of experts or other witnesses, they must not usurp the province of the court and jury by drawing conclusions of law or fact upon which the decision of the case depends.

"Likewise, questions propounded to experts should not require answers involving questions of law, morals or duty, matters of conjecture or speculation; * * *"

To the same effect are the following authorities:

20 Am. Jur. 672, Sec. 799;

Stone vs. Pratt Consol. Coal Co.,
(Ala.) 80 So. 882;

Baltimore Belt R. Co., vs. Sattler,
(Md.) 59 Atl. 654, 660;

Wilkerson vs. City of ElMonte,
(Cal. DCA) 62 Pac. (2d) 790, 794;

Gardine vs. Cottey,
(Mo.) 230 S.W. (2d) 731, 18 A.L.R. (2d) 1100, 1118;

Patterson vs. Howe,
(Ore.) 202 Pac. 225, 229.

This question also went to the issue of negligence. It is for the jurors to draw any conclusions the facts warranted, Smith could not do this for them.

32 C.J.S. 82, Sec. 448;

32 C.J.S. 90, Sec. 453.

The United States Supreme Court as well as this Court has decided this question to the effect that such a question and answer constitutes reversible error.

United States vs. Spaulding,
293 U. S. 498, 79 L. Ed. 617;

United States vs. Sullivan,
(9th Cir.) 74 Fed. (2d) 799;

United States vs. Hibbard,
(9th Cir.) 83 Fed. (2d) 785.

The Supreme Court held in the Spaulding case that the question of permanent disability was not to be resolved by opinion evidence:

> "It was the ultimate issue to be decided by the jury upon all the evidence in obedience of the Judge's instructions as to the meaning of the crucial phrase and other questions of law. The experts ought not to have been asked or allowed to state their conclusions on the whole case."

That, in effect, was what the witness Smith did, his testimony was not only inadmissible, but it was an erroneous conclusion as to the whole case.

This court in the Sullivan and Hibbard cases, supra, where physicians testified that a veteran was totally and permanently disabled, and objection was made that this was a direct invasion of the province of the jury, and the objection overruled, stated that the objection should have been sustained and judgments for the plaintiffs were reversed because of the error.

The Court erred in giving to the jury certain instructions. (Specification of Errors IV, V and VI).

The law with reference to the instructions set forth in Specification of Errors IV, V, and VI has already been covered in our discussion with reference to negligence and proximate cause, except for what will be presently mentioned.

With reference to the instruction contained in Specification of Error IV, our objection went to the last sentence, which is italicized. We earnestly urge that this part of the instruction was erroneous and prejudicial. It was not applicable to the facts in this case; there was absolutely no evidence by the appellees, or anyone else, that there was anything defective in any of the equipment or appliances in or about the substation. On the other hand, the proof is undisputed that there was nothing defective (R 182-183, 203-205, 236-237, 344-345).

The instruction emphasized the term "defect" in three different expressions—defects, defective appliances and defective electrical apparatus, upon which there was no evidence. This, in effect, injected an issue into the case which was not there.

An instruction not based upon evidence is erroneous and introduces before the jury issues not presented thereby and is well calculated to mislead and induce them to suppose that a state of facts constituting such issues existed.

Nordquist vs. W. A. Simons Co.,
54 Ida. 21, 28 Pac. (2d) 207, 209;

McIntire vs. O. S. L. RR. Co.,
56 Ida. 392, 55 Pac. (2d) 148, 150.

As was stated by the United States Supreme Court in *Norfolk & W. R. Co., vs. Holbrook,* 235 U. S. 625, 59 L. Ed., 392, where the facts brought out during the course of the trial were adequate to constitute a strong appeal to the sympathy, naturally engendered in the minds of the jurors, that

> "In such circumstances it was especially important that the charge should be free from anything which they might construe as a permission to go outside of the evidence. It is the duty of the court in its relation to the jury to protect the parties from unjust verdicts arising from impulse, passion, or prejudice, or from any other violation of lawful rights."

The instruction further in effect told the jury that the appellant was "dealing in electricity," when the facts show it was not. As previously stated, the Pacific Fruit Express Company and the Union Pacific Railroad Company were merely co-users of power from the Idaho Power Company. The Railroad merely permitted the Express Company, at its request, to tap a line onto appellant's line and to take its electricity in that fashion; but it was all generated and supplied by the Idaho Power Company. The Express Company owned, operated and controlled not only the substation but the line leading to it, and the Union Pacific Railroad Company had no responsibility concerning it, either to keep it in repair or to see that the Express Company obtained power. There was a meter in the substation in order to ascertain the amount of power used, because the Union Pacific was billed

for the whole amount and rebilled the Express Company for what it used, plus 10% for the transformer and transmission losses, but this did not put the Union Pacific in the electrical business; it was only a user or consumer, and nothing else. If the Idaho Power failed to supply power to the Railroad then the Pacific Fruit Express had no power and neither did the Railroad. It was not shown that the Railroad was generating any electricity and the instruction with reference to "deadly current" certainly prejudiced appellant's substantial rights.

The Union Pacific had no way of foreseeing all of the unusual and unlooked for things that were to take place that afternoon by the Pacific Fruit Express and the appellee La-Verl Johnson. It owed no duty to anyone to cut off this power, first, because it was not delivering electricity; secondly, because it was not the electrical energy going into the substation that legally caused the injuries; those injuries were legally and actually caused by the unusual conduct and method of operation by the Pacific Fruit Express; thirdly the Pacific Fruit Express owned, operated and controlled the line and it had the means and ability to cut off all power in the substation by pulling the pole-top switch and also the disconnect switches to the arrestors.

The substation was perfectly safe to receive the power and had been receiving for twenty-five years (R 236-237). Mr. Gilbert, who appeared as a witness for the appellees and the appellant, testified that there was nothing defective in or about the substation; that it was as safe now as at the time it was built; that it was capable of receiving safely the

energy being supplied, and under those circumstances he would not have advised his employer, the Idaho Power Company, to cut off the power (R 238).

With reference to the instruction contained in Specification of Error V, appellant claims that the italicized portion of the instruction was erroneous. This instruction, we contend was not applicable to the facts in this case. First of all, as we have stated, appellant was not supplying any electrical current to the substation; neither is there any evidence that the Pacific Fruit Express "was a customer of the defendant" with respect to electrical current, for the energy came from the Idaho Power Company. The Express Company and the Union Pacific were merely co-users of the power and the Railroad was neither generating or delivering it.

The italicized portion of the instruction refers to hazardous and dangerous conditions of the wiring and appliances maintained by a customer. There was nothing defective in the substation, and the Railroad was not delivering the power. If there were any hazardous and dangerous conditions in the substation which were responsible for Johnson's injuries, it was because the substation was not properly operated by the Express Company (R 183, 203, 209, 237, 239, 246).

With reference to the instruction contained in Specification of Error VI.

We have already discussed this instruction, we think, with reference to the previous instructions, and what we have said there applies to this instruction, particularly with reference to dangerous and hazardous conditions. However, it should be

noted that the appellant was not furnishing electricity to the Pacific Fruit Express, for a valuable consideration, or otherwise. The Idaho Power Company was the one that was furnishing the energy; the Express Company and the Railroad being joint users of that energy. There is no evidence that the Union Pacific in any event was obtaining any profit or valuable consideration out of the deal, for it merely billed the Pacific Fruit Express for what energy it used from the Idaho Power, plus a 10% transformer and transmission loss, which was agreed between the Oregon Short Line Railroad Company and the Express Company to be a loss. Therefore, the Railroad neither then nor now was making a profit out of the joint use of the power.

The court erred in refusing to give to the jury certain of the appellant's requested instructions. (Specification of Errors VII, VIII, IX, X, XI).

Specification of Error VII relates to appellant's Requested Instruction No. 1, which was a peremptory instruction and should, in our opinion, have been given by the court. The facts and the law with reference to this are fully discussed with reference to negligence and proximate cause.

Specification of Error No. VIII is appellant's Requested Instruction No. 6. This instruction should have been given because the law contained therein was not otherwise given.

The evidence shows without controversy that the appellant was not furnishing or supplying electricity but this instruction was requested, first because it stated the law, and secondly, because assuming but not admitting that the appel-

lant was delivering electricity, there was no liability on the facts if the jury found the facts to be as stated in the instruction. We think the jury should have been so instructed. *Schnee vs. So. Pac. Co.*, (9 Cir.) 186 Fed. (2d) 745, 748. The instruction is sustained by the authorities set forth in *134 A.L.R. 511.*

Specification of Error IX, which is appellant's Requested Instruction No. 7. This instruction was vitally important and the law was not otherwise given to the jury. It is true that the court instructed the jury with reference to proximate cause, but only in a general way (R 372). No where was the jury instructed as to what facts or circumstances would constitute a break in any chain of causation, or what acts or conduct on the part of the Pacific Fruit Express officers or agents could be taken into consideration in determining proximate cause. The jury had the right to know this and that the law required an instruction telling them how or in what manner proximate cause could be determined. *Schnee vs. Southern Pac. Company,* supra. The instructions that were given were wholly insufficient to guide the jury in coming to a conclusion justified under the evidence.

The authorities set forth and discussed in connection with negligence and proximate cause fully support this instruction. The power going into the sub-station created at most only a condition and not the proximate cause. The manner and method of the operation of the sub-station by the Pacific Fruit Express constituted the proximate cause of Johnson's injuries.

Specification of Error X refers to appellant's requested

instruction No. 8. This instruction was a necessary one, for the law was not otherwise stated to the jury, except that proximate cause was in a most general way only mentioned. Without this instruction and appellant's Requested Instruction No. 7, the jury was given no guide to follow in applying proximate cause. The instruction, as we have demonstrated under our discussion of proximate cause, is an accurate statement of the law and was a necessary part of the case upon which the jury had no instructions. In addition to that, it was one of appellant's theories, and we think it was the duty of the trial court to instruct upon every reasonable theory finding support in the pleadings and the evidence.

Idaho Gold D. Corp. vs. Boise Payette Lbr. Co.,
64 Ida. 474, 133 Pac. (2d) 1017, 1019;

Mason vs. Hillsdale Highway Dist.,
65 Ida. 833, 154 Pac. (2d) 490, 498;

Jones vs. Mikesh,
60 Ida. 680, 95 Pac. (2d) 575.

Specification of Error XI. This was a special interrogatory presented by the appellant requiring the jury to specify how and in what manner the Railroad Company was negligent if it returned a verdict in favor of the plaintiffs.

While we appreciate that the submitting of special interrogatories is generally discretionary, nevertheless in a case of this sort, where sympathy permeated the entire case to such a degree it is reasonable to suppose that because of this it was difficult for the jury to coolly and dispassionately consider

the merits of the case. LaVerl Johnson's injuries were very serious and generated pity and sympathy. We think under the evidence in this case that if the jury had been compelled to answer this interrogatory it could not have found any negligence on the part of the Railroad Company. In any event, there is no reason why a jury, when it returns a verdict certainly as high as it did in this case should not tell us upon what it based its verdict other than the fact that the man was seriously injured.

CONCLUSION

We submit that appellant's Motion for Directed Verdict or Motion for Judgment Notwithstanding the Verdict should have been sustained, first, because appellant was not negligent; secondly, because negligence, if any, was not the proximate cause.

After the substation was built (R 277), it was accepted by Mr. Branum, and since that time it has been owned, operated and controlled by the Pacific Fruit Express Company. Exhibits 30, 31 and 32 (R 262-265, 250-253, 266, 273-274, 294-296, 332-333).

> "When he accepts work that is in a dangerous condition, the immediate duty devolves upon him to make it safe; and if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury."
>
> *Borgaratt vs. Pratt-Whitney Aircraft Co.*,
> (Conn.) 157 A. 860, 866.

Most certainly appellant's Motion for New Trial should have been granted for the reasons assigned and discussed. We think from an entire consideration of the entire case that the evidence and other proceedings demonstrates prejudicial error for the following reasons:

1. The evidence is wholly insufficient to justify the verdict and it is against the law.
2. The verdict was grossly and monstrously excessive, requiring a new trial.
3. The court erred in permitting the witness Smith to testify as to *duties* of one delivering electrical energy.
4. Error in giving the three instructions referred to.
5. Error in refusing to give defendant's requested instructions and special interrogatory.

Respectfully submitted.

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